

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2008-094527

06/07/2011

HON. M. JEAN HOAG

CLERK OF THE COURT
C. Towles
Deputy

IN RE THE MATTER OF
BASILIO MANUEL MOLINA

JASON PISTINER

AND

PHILICIA MONIQUE MEDRANO

HOLLY A BARTEE

UNDER ADVISEMENT RULING

This matter having been taken under advisement on April 22, 2011, after the receipt of closing arguments, the Court now rules.

This matter comes to this Court as a result of the Petition to Modify Child Custody, Parenting Time and Child Support filed by Father on November 20, 2009. The Court has reviewed the exhibits, evaluated the testimony and credibility of the witnesses, and considered the best interests of the child.

THE COURT FINDS AND DETERMINES AS FOLLOWS:

Mother, the primary caretaker of the child, Tiana (DOB: 02/01/06), testified that the child would grab her privates while bathing and state: "Daddy Basil would do that." Basil is Father's name. At the time this happened, she was still in a diaper. She would also "grab herself" over her diaper as well. She would open her doll's legs and lick the doll between the legs.

Father had been participating in supervised visits. Mother had asked another adult be present with Father when he had his parenting time because in May, 2008, the child had told

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Mother that “Daddy Basil” would touch her “privates.” The child would wiggle her tongue, grab herself, and make a face.” Mother did not keep the child from Father but did require an adult be present for the visits, i.e. one of Father’s family members.

On or about August 19, 2009, Tiana was in Mother’s bed, “grabbing herself and moving her hand around over her ‘chonies’.” She lifted up her nightgown and put her hand in “her privates where she pees.” Mother called the police.

Mother was advised to take the child to Mesa Advocacy Center. The child was interviewed and Dr. Luma performed an examination. Dr. Luma made his findings: He reported the absence of a hymen and arrhythmia on the exterior of the vagina as well as abrasion and breakdown of the skin on the interior superior or top of the vagina. He documented the child reported: “Basil touches...under the underwear” and “he puts his fingers into me.” The child also reported sleeping with Father during the supervised visits and, at trial, Paternal Grandmother confirmed this. He testified he followed the standard of care and reported his findings to the Mesa Police Department. He also reported it to a “small community sheriff” around the town where this allegedly happened.

A later examination revealed the child did have an annular hymen that is patent or open in the middle. The doctor testified this would not necessarily change his original diagnosis of sexual assault. Dr. Luma testified an annular hymen is not a normal hymen; it is not indicative of sexual abuse but it is suggestive of sexual abuse when combined with the statements of the child and the abrasions in the vagina. Dr. Luma stated less than 2% of hymens are annular and that in those cases they occur “naturally.”

Previously, in May of 2008, the child had been examined and the medical report indicated she had a vaginal discharge and odor intermittently for five months. Dr. Luma testified this could be consistent or an infection, normal discharge, a foreign body in the vagina or sexual abuse. The notes at that time documented the child was reporting that Father touched her privates.

In approximately October, 2009, Mother sought and was granted an Order of Protection which included the child. This was sought, apparently, because Father was granted unsupervised parenting time after a Motion for Reconsideration was granted in August, 2009, granting him unsupervised parenting time and on the advice given to Mother by the Mesa Police detective. Father’s Motion had been filed June, 2009. Counsel for Mother argues that the Court did not have the benefit of the Mesa Police Department information available to it before it ordered the unsupervised visits to Father.

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On cross examination, Mother admitted she did not like Mariah, Father's girlfriend, did not want her around her daughter, and called her a "bitchy ass girlfriend," among other derogatory terms. Mother stated she was not trying to keep **Father** from his child, only Mariah. The evidence supports this testimony. Mother was also questioned about her friend, Susie Medino, selling raffle tickets to help raise money to pay Mother's attorney for this litigation. Mother stated the sale was all orchestrated by Susie, her friend, and she did not know anything about it. Further, Mother has not asked Father to give up his parental rights, despite the fact she married April, 2008. Finally, Mother was asked about child support from Father to her and she testified: "He just doesn't pay." The Court has considered all of the cross examination of Mother in making its ruling this date.

Ultimately, Father was ordered to have supervised parenting time with Little Tree, a professional service. Mother reported since Father had exercised his parenting time at Little Tree, the child "has not been fondling herself."

Marilyn Daniels, previous owner of Little Tree Family Services, testified. Ms. Daniels ceased working for Little Tree in July, 2010. She testified Father would have his daughter, then four years of age, make a peanut butter sandwich for him and then would "hone in" and watch her lick the peanut butter from the knife. He would rub aloe on her arm in a "sensual manner." Further, the Father had been instructed many times not to have the child sit on his lap but continued to do so and had to be reinstructed many times.

Gayle Byrd, formerly of Little Tree Family Services, also testified. She stated that Father was cognizant of rules, had general activities going on with the child which she supervised, and there was nothing negative at all about Father's supervised parenting time. Overall, she reported Father's behavior was appropriate from December, 2009, to July, 2010, when she supervised Father. Ms. Byrd testified she quit working for Little Tree and Ms. Daniels because Ms. Daniels "found many of her clients guilty and she couldn't continue with the situation." She reported that Mother would send the child in inappropriate jeans that would slide down and show the child's "butt crack." Mother never addressed this situation despite Ms. Byrd's suggestion she do something about this. Ms. Byrd reported that Ms. Daniels stated Father would "never get off supervised visitations."

Mr. Patricio de los Santos also testified. He was previously a supervisor for Little Tree but left in February, 2011, and now works for Legacy, another supervising agency. Previously, he worked for Motorola. He agreed Ms. Daniels would express opinions to the staff about clients. The Court finds Mr. de los Santos testimony persuasive. In a report dated November 22, 2010, the witness's observations were documented: Father and child played baby and mommy, and Father was the baby. The witness described Father lying on the couch in a fetal position like a baby, and he would ask Tiana to make a toy from Legos in a "phallic or tower shape." This

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happened “maybe twice.” The witness observed sexual gazing on two occasions during activity time. Upon questioning, he demonstrated this “look” to the Court and stated he did not disagree with the word “salacious,” as documented. It is difficult for the Court to describe the look other than to say it did not communicate a tender father/child look but, rather, at the least an inappropriate or adult gazing. He also observed Father stroking the child’s hair a handful of times which was against the rules. Mr. de los Santos described Father watching the child make a sandwich. During this time, Father did “not have the look” which the witness described as a sexual look, but he would watch the child make the sandwich and not help her. She was only four at the time and she would make the sandwich for her Father, not the other way around.

Father testified at one point while at a pizza restaurant he asked Tiana why she was saying this about him (accusations of touching) to which Tiana stated “because you do—Daddy Basil touches me” –or words to that effect.

Father now requests reimbursement for his supervised visit expenses and attorney fees. He is stating that Mother has been unreasonable. The police investigation has been closed, he has never been charged with a crime, and the CPS case was closed as well. He suggests someone else may be molesting his child but it is not him. He stated he has taken ten parenting class at Little Tree plus purchased the required book.

THE COURT FINDS AND DETERMINES AS FOLLOWS:

Mother has been primary caretaker (most recently) of the minor child and currently has sole custody;

Both parents wish to have the child in his/her care;

The child has reported on numerous occasions that Father touches her inappropriately/sexually;

The child is integrated well in both families (save and except for her statements regarding her father);

Mother and child present no physical or emotional or mental health issues; however, the Court finds that Father is in need of intensive counseling to address the accusations of his daughter;

There is no coercion or duress as there are no agreements between the parties; and

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Father has been reported to the police and to CPS due to the minor child's statements of sexual abuse.

Accordingly, Father has failed to meet his burden of proof. Mother shall continue to have sole custody, as this is in the child's best interests. Father shall continue with supervised visitation. Although the Court awards Father supervised visitation with some hesitation, Mother testified the child's behaviors have subsided since professional services were put in place to observe Father's parenting time and, therefore, the Court will allow the professionally supervised parenting time to continue as presently ordered.

The Court is at a loss as to what kind of counseling to order Father. It is clear to this Court that this child has, over the years during the course of her young life, repeatedly made accusations against Father of sexual touching. Independent witnesses have observed the child verbally state or physically demonstrate concerning behaviors. Father, himself, has been observed acting if not inappropriately then in an unusual and not fatherly manner toward his daughter. The Court strongly urges Father to gain insight into his behavior through counseling.

CHILD SUPPORT

Mother's gross monthly income: zero which the Court imputes minimum wage: \$7.35 an hour;

Father's gross monthly income: \$1732.00;

Health insurance: \$26.00 a month, Mother pays

Father's parenting time: Supervised four hours per week

Day care: Zero

Counsel shall stipulate and submit a Child Support Worksheet (new guidelines were implemented 6/1/11) and Child Support Order by June 15, 2011, for the Court's signature.

No good cause shown and the Court finding Mother has not been unreasonable after an evaluation of A.R.S. § 25-324,

IT IS ORDERED denying Father's request for fees, costs and reimbursement.

FILED: Exhibit Worksheet.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.